No. 94-1649

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH ELLMAN,

Petitioner,

—against—

R.E. DAVIS, Warden, Westchester County Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent R.E. Davis, Warden of the Penitentiary of Westchester County, by his attorney, Dennis C. Vacco, Attorney General of the State of New York, respectfully submits this brief in opposition to the petition for certiorari.[1] The United States Court of Appeals for the Second Circuit unanimously reversed the district court's grant of a writ of habeas corpus, holding that petitioner failed to exhaust his state remedies when he withdrew two state court appeals after fil-

[1] Because R.E. Davis was named respondent in the petition in the district court only in his capacity as custodian of petitioner, and this habeas corpus proceeding concerns an action in the state court brought by the Attorney General of the State of New York, by order of the district court the Attorney General was permitted to proceed in place of respondent. Therefore, respondent will be referred to as "Attorney General."

ing a federal writ of habeas corpus and that his attorney's earlier failure to pursue those appeals in a procedurally proper manner did not render petitioner's state remedies so futile that it excused petitioner from satisfying the exhaustion requirement. Because the decision of the court of appeals is consistent with settled principles of exhaustion and does not conflict with decisions of this Court or the other courts of appeals, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. The State Court Action

In November, 1987, the Attorney General commenced an action for corporate dissolution and injunctive and related relief against the Westchester County Society for the Prevention of Cruelty to Children, Inc. ("Westchester SPCC"), its directors and officers, and its incorporator and undisputed leader, petitioner Kenneth Ellman. A 2.[2] Societies for the prevention of cruelty to children are charitable, not-for-profit corporations granted extraordinary powers under New York law, including the authority to appoint peace officers who may carry handguns and make summary arrests. New York Not-for-Profit Corporation Law ("N-PCL") § 1403, (McKinney Vol. 37); New York Criminal Procedure Law ("CPL") §§ 1.20(33), 2.20 (McKinney Vol. 11A); New York Penal Law ("Penal Law") § 400 (McKinney Vol. 39). A 2. The complaint alleged that the organization's activities posed a threat to public safety in Westchester County because the Westchester SPCC, under petitioner's direction, had exceeded its authority and abused its special powers by operating as an unaccountable, private secret police force. Among the abuses detailed in the complaint were that petitioner and the other defendants had stockpiled an arsenal of handguns

[2] Citations in this form are to the appendix annexed to the petition for a writ of certiorari.

far more powerful than those used by most police departments. A 16-17.

A preliminary injunction was entered against petitioner and the other defendants in May, 1988, in which, *inter alia*, petitioner was directed to register six handguns in his possession. A 3. When petitioner failed to register the six handguns specified in the state trial court's preliminary injunction, the Attorney General moved to hold him and the other defendants in civil contempt of that order. A 3. In response to the Attorney General's motion, the petitioner contended, without substantiation, that the handguns were no longer in New York but were in New Jersey. A 80. However, New Jersey firearms registration records that were never submitted in the state trial court action reflected that the seventeen handguns were not registered by petitioner in that state until November, 1990. A 72-75.

After petitioner failed to comply with a further order directing him to turn over to the New York State Police all handguns in his possession for which no license had been obtained, the Attorney General again moved for an adjudication of civil contempt against both petitioner and the corporation. A 3. After rejecting a motion by all of the defendants to vacate this "turn over order" on the grounds that the state court lacked jurisdiction to direct the production of handguns that were allegedly no longer in New York State, the court held a civil contempt hearing, and, in a decision in open court on February 1, 1991, and also embodied in a written order on February 5, 1991, the state court held petitioner in contempt.[3] A 3.

The state trial court afforded petitioner an opportunity to purge his contempt if he surrendered the seventeen weapons to the New York State Police. In the event petitioner failed to

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[3] Prior to the conclusion of the hearing, the contempt charges against the other defendants, the corporation and its directors, were settled by agreement of the parties. A 19.

comply with this directive, the order provided that petitioner would be "imprisoned in the Westchester County Jail for a period not exceeding 90 days or until discharged according to law." A 3. Petitioner did not purge his civil contempt and, in accordance with the terms of the order entered February 5, 1991, the state trial court issued a warrant for his arrest on February 8, 1991. A 3.

In August, 1991, petitioner appealed from the civil contempt order of February 5, 1991. A 3. In an unsuccessful application for a temporary stay of the trial court's contempt order, petitioner alleged that he could no longer comply with the order because he had disposed of the weapons. A 3. The appeal was ultimately dismissed on the ground that petitioner had chosen to remain outside the state of New York rather than comply with the order, and he was, thus, "a fugitive from justice and [was] unavailable to obey the mandate of the court." A 3. Petitioner's motion to appeal that dismissal to the New York Court of Appeals was denied on the ground that the civil contempt order "does not finally determine the action within the meaning of the Constitution." His motion for reargument of that determination was also denied. A 3.

During this period, the Attorney General also sought the dissolution of the Westchester SPCC on the grounds that the corporation had willfully failed to register with the Attorney General and to file financial reports as a New York charitable entity pursuant to New York Estates, Powers and Trusts Law § 8-1.4 (McKinney Vol.17B). A 3. By order entered January 25, 1991, the corporation was directed to register with the Attorney General and to file financial reports. After the Westchester SPCC disregarded this order, partial summary judgment was entered for the Attorney General on August 2, 1991, dissolving the Westchester SPCC. A 3.

Petitioner remained a fugitive until his apprehension on July 24, 1992, by representatives of the New York City Sheriff's office pursuant to the state trial court's arrest warrants.

A 4. On July 27, 1992, he was produced before the state trial court and again offered the opportunity to purge himself of the contempt by turning over the seventeen handguns. Petitioner refused and was committed to the Westchester County Penitentiary pursuant to the civil contempt order. A 4.

B. State Court Challenges To Detention

On September 18, 1992, petitioner sought a writ of habeas corpus from the state trial court. The grounds asserted in the petition were, *inter alia*, that petitioner's detention deprived him of due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution. A 4. The state trial court denied the writ of habeas corpus from the bench on September 24, 1992. A 4. When petitioner's counsel failed to submit a written order for the court's signature in the form required by the court, the state trial court prepared and signed a written order denying the writ on January 14, 1993. A 224. Petitioner appealed from that order by notice of appeal dated February 2, 1993, but withdrew his appeal on April 10, 1993, after filing his federal habeas corpus petition. A 5-6.

On October 5, 1992, petitioner commenced another proceeding, this time seeking a writ of prohibition in the New York Supreme Court, Appellate Division, Second Judicial Department. A 4. In that application, he raised all of the issues that he had presented in his state petition for a writ of habeas corpus, and additionally sought a writ of prohibition against his further detention. The Appellate Division denied the petition and dismissed the proceeding on December 7, 1992, on the grounds that, "the petitioner here has failed to demonstrate a clear legal right to the relief requested which could not otherwise be safeguarded through alternative remedies." A 5. Petitioner's motion for leave to appeal to the New York Court of Appeals from that order was denied on March 25, 1993. A 5.

At the conclusion of the initial ninety-day period of petitioner's detention, the Attorney General moved to extend his civil contempt commitment for an additional ninety-day period on the ground that petitioner continued to refuse to surrender the handguns, although he remained able to do so. A 5. The state trial court granted the Attorney General's motion to extend petitioner's civil contempt for an additional ninety-day period pursuant to the New York civil contempt statute, New York Judiciary Law § 774 (McKinney Vol. 34). A 5. Petitioner's counsel objected to the state trial court's determination being set forth only in a directive contained in the minutes of the proceeding, signed by the court and entered by the clerk (the "so ordered" transcript), but did not subsequently submit a formal order as an alternative. A 4.

On November 18, 1992, petitioner filed a notice of appeal from the "so ordered" transcript ordering petitioner's continued detention, and subsequently perfected the appeal. A 5. However, on March 2, 1993, the Appellate Division, Second Judicial Department, dismissed the appeal *sua sponte* on the grounds that the order appealed from was "merely a decision, which is not appealable." A 5. After learning of the dismissal, the Attorney General submitted a second order, *nunc pro tunc*, which was entered on March 31, 1993. Petitioner did not seek to appeal from that order.

On January 14, 1993, the Attorney General again sought an extension of petitioner's detention for civil contempt, on the same grounds—that petitioner continued to refuse to comply with the state trial court's orders. Petitioner again appeared, represented by counsel, and he once again declined to purge himself of his contempt. A further order was entered extending his incarceration pursuant to Judiciary Law § 774(2). A 5. On February 2, 1993, petitioner filed a notice of appeal from that order extending his detention, but withdrew the appeal on April 10, 1993, after filing his federal writ. A 5-6.

Petitioner withdrew his two pending appeals, (1) from the order entered January 13, 1993 denying the state writ of

habeas corpus and (2) from the order entered January 14, 1993 extending his civil contempt incarceration, before any New York appellate court had addressed the merits of his constitutional claims. A 5-6. The Attorney General opposed this application, on notice to both petitioner and his attorney, on the grounds that the discontinuance of the appeals would represent a deliberate bypass of state appellate remedies that petitioner was required to exhaust as a prerequisite for federal review. Nevertheless petitioner did not withdraw his application and his motion was granted by the Appellate Division in an order dated May 21, 1993. A 6.

C. The Federal Habeas Corpus Proceeding

Just five days before petitioner withdrew both state court appeals, on April 5, 1993, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York. A 131. In the petition, petitioner asserted twenty-four constitutional and federal statutory grounds challenging his detention, including the constitutional claims that he had previously raised in the state appeals that he had withdrawn and which he has again raised in his pending motion in the state trial court to dismiss the state court action.[4] A 63, 149-160.

On May 4, 1993, the Attorney General moved to dismiss the petition on the grounds that petitioner had failed to exhaust his state remedies as required by 28 U.S.C. § 2254(c). A 6. By memorandum and order filed June 8, 1993, the district court converted the motion to dismiss the petition into a

[4] The litigation in the state trial court remains pending today. On June 17, 1993, petitioner moved to dismiss the state trial court action on the grounds, *inter alia*, that the state court was without authority to proceed against him following the dissolution of the Westchester SPCC and that to do so would deprive him of due process in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. A 63. At the request of the Attorney General, the state trial court action has been stayed pending entry by the district court on remand of a final order dismissing the federal habeas corpus petition.

motion for summary judgment, and cross-motion for the same relief, on the grounds that "the procedural issue of exhaustion of remedies is inextricably intertwined with the merits, or lack thereof, of the petition itself." A 6.

On October 12, 1993, the district court granted the petition for a writ of habeas corpus. A 12-34. The court determined that petitioner had exhausted all available state remedies by his attempts to appeal from the denial of the writ of prohibition and from the extension of his incarceration pursuant to the "so ordered" transcript, and, in any event, further pursuit of relief in the state courts would be so ineffective as to be futile. A 26-30. The court based the latter conclusion upon findings that petitioner's state remedies were "virtually inexhaustible" because a new recommitment order was entered against him at ninety-day intervals and that the state had deliberately frustrated his efforts to exhaust by failing to object to the use of the "so ordered" transcript by the state trial court. A 27-28. Notwithstanding petitioner's pending motion before the state trial court, the district court also held that finality had been provided to the state proceedings by petitioner's withdrawal of his two pending appeals. Final judgment was entered on November 29, 1993. A 25-26.

D. The Decision of the Court of Appeals

On appeal, the Court of Appeals for the Second Circuit reversed and remanded to the district court to enter judgment dismissing the petition. 39 F.3d 473 (2d Cir. 1994). A 1-11. The court disagreed that petitioner had fairly presented his federal claims to the state appellate courts for review on the merits by filing procedurally defective challenges to his incarceration. Rather, the court held that it was the responsibility of petitioner's attorney, not the State, to submit orders in acceptable, appealable form to the trial court. A 11. Moreover, the court concluded that, irrespective of those missteps, his deliberate withdrawal of his two state appeals independently barred federal review:

> The [district] court, however, failed to consider that Ellman, after missing several opportunities to perfect a state appeal, voluntarily withdrew his state appeal for no apparent reason. While the missed opportunities alone may have operated to bar Ellman's federal habeas petition, his voluntary withdrawal clearly deprived the state courts of the opportunity to hear his constitutional claims and thus barred federal relief.

A 7-8.

The Second Circuit thus reversed the district court's decision. Petitioner's motion for rehearing and rehearing *en banc* was denied by the court of appeals on February 6, 1995. A 37-38. Petitioner then moved to enlarge the record on appeal to include evidence which he claimed established that his attorney had not once, but twice, attempted to submit an appealable order denying the petition for a State writ of habeas corpus. This motion was also denied by the court of appeals. The district court, however, granted the same motion on January 18, 1995. A 35-36. Having succeeded in enlarging the record to include this "evidence," petitioner again moved in the circuit for hearing *en banc* "to inform the *en banc* court of [the] new record". The motion was denied by order dated February 6, 1995. A 39-40.

REASONS FOR DENYING THE WRIT

In holding that petitioner was not entitled to federal habeas corpus relief because he had failed to exhaust his state remedies, the court of appeals merely applied well-established principles of exhaustion.

Since this Court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), which held that a deliberate bypass of available state appellate remedies precludes federal review, and more recently in *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that a default in pursuing available state appellate reme-

dies also precludes such review absent both cause for the default and actual prejudice resulting from the alleged federal violations, exhaustion of state remedies is an absolute prerequisite to federal habeas corpus relief. Here, petitioner had two appealable orders entered on January 13, and 14, 1993, respectively, from which he filed notices of appeal. However, he withdrew them just five days after filing the petition for federal habeas relief. By that deliberate act, petitioner was expressing an impermissible preference for the federal forum. *Engle v. Isaac*, 456 U.S. 107, 130 (1982).

This Court has also long held that it is not sufficient merely that a habeas petitioner has been through the state courts; his claims must be fairly presented so that the state has the opportunity to correct any alleged constitutional violations. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). Compliance with those procedures will only be excused where the state process is "so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Thus, the court of appeals' decision that petitioner's unsuccessful attempts to obtain state court review were due to his failure to comply with legitimate procedural requirements of the state courts and precluded federal court review was consistent with well-established law.

Petitioner argues, however, that Supreme Court review is appropriate in this case because an alleged complicity by the State in delaying his appeals from the order denying state habeas relief and from the order extending his contempt incarceration should have been found to excuse his failure to exhaust state appellate review. With respect to review of the state court's denial of his habeas petition, petitioner argues that although his attorney proffered proposed orders to the state trial court on two occasions which were defective, the court should have promptly entered an appealable order.[5] With

[5] The defect in the second proposed order submitted by the petitioner's attorneys, which was apparently not served upon and was thus unknown to the Attorney General until petitioner's post-appellate motion

respect to review of the orders extending petitioner's incarceration, petitioner argues that he should be deemed to have exhausted his appellate remedies because he perfected an appeal from a directive that his own attorney had declared, and the state courts ultimately concluded, was not appealable. In each instance, petitioner urges this Court to accept a different view of the facts than that adopted by the court of appeals regarding the manner in which his attorneys' discharged their duties. Alternatively, petitioner posits the creation of a new qualification or exception to the exhaustion doctrine—that where the state fails to review the work of and correct any procedural errors committed by a habeas petitioner's attorneys, it forfeits the right to assert the defense of exhaustion. There is no support for such a proposition, either in the decisions of this Court or in decisions of other courts of appeals.

Notwithstanding his deliberate bypass of state appellate review, petitioner alternatively argues that the Court should grant this petition because, he claims "actual innocence" and that it would be a "fundamental miscarriage of justice" were he now to be compelled to exhaust state appellate remedies. Relying upon an exception to the exhaustion doctrine articulated in *Murray v. Carrier*, 477 U.S. 478, 495 (1986), petitioner claims that since the state court lacks jurisdiction to compel production of the handguns at issue following the dissolution of the corporation, he should not be required to exhaust his federal claims in the still-pending state court action.[6]

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to enlarge the record, is obvious on its face. While the body of the proposed order is substantially identical to the version ultimately entered by the state court, the proposed order that is reproduced in petitioner's appendix was incorrectly entitled "Petition for Writ of Habeas Corpus" rather than "Order and Judgment on Petition for Writ of Habeas Corpus."

[6] Petitioner is wrong. The state trial court retains jurisdiction over petitioner and the handguns pursuant to its powers under New York law to adjudicate the disposition of what may be property of a dissolved not-for-profit corporation. New York N-PCL § 1008 (McKinney Vol. 37).

This argument distorts the intent of this narrow exception created as a last refuge from punishment for innocent detainees who have no recourse other than a federal writ. The exception has no application where a prisoner still has state appellate remedies available to him that he has not exhausted. The Court's recent analysis of this narrow exception focuses on the availability of a new trial and the possibility of executive clemency to address a claim of actual innocence asserted by a convicted defendant facing execution and is founded upon the presumption that to seek its invocation a petitioner must no longer have meaningful state remedies to which he may resort. *Herrera v. Collins*, ___ U.S. ___, 113 S. Ct. 853, 122 L.E. 2d 203 (1993). In this case, by contrast, proceedings in the state trial court from which petitioner may appeal his federal claims are currently pending, and he has in fact submitted a motion raising those very claims. The question of his "actual innocence" should first be reviewed by New York's appellate courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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